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OFFICE OF PETITIONS

In re Application of
Audrey Goddard et al.
Application No. 10/700,992
Filed: November 3, 2003
Attorney Docket Number: **GNE-0304 R1C1**

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: **DECISION ON PETITION**
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This is a decision on the petition under 37 CFR 1.137(b)¹, filed February 14, 2011, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)" or "Renewed Petition under 37 CFR 1.137(b)." This is not a final agency decision.

The instant application was abandoned for failure to reply to a non-Final Office Action mailed December 21, 2006. A petition to revive was filed January 13, 2010 solely for the purpose of entering the Amendment. Further, Applicants respectfully requested that the above-captioned application be expressly abandoned upon entry of the Amendment. Accordingly, a Notice of Abandonment was mailed April 30, 2010.

¹ Effective December 1, 1997, the provisions of 37 CFR 1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). A grantable petition filed under the provisions of 37 CFR 1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof. In an application abandoned for failure to pay the publication fee, the required reply must include payment of the publication fee.

(2) the petition fee as set forth in 37 CFR 1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Director may require additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

Comes now petitioner with the instant "petition to revive to amend the priority claim in Application. Serial No. 11/697,201 to reflect additional priority data determined by Applicants. Therefore, by way of this Petition, Applicants seek to revive the above-captioned application solely for the purpose of amending the priority claim to reflect the data submitted in the Amendment filed herewith and attached hereto as Exhibit A (the "Amendment"). Applicants note that the Amendment merely corrects the form of the priority claim in the above-captioned application to comply with the requirements of 37 C.F.R. § 1.78(a)(2) and (a)(5)."

37 CFR 1.138 provides that:

An application may be expressly abandoned by filing in the Patent and Trademark Office a written declaration of abandonment signed by the applicant and the assignee of record, if any, and identifying the application. An application may also be expressly abandoned by filing a written declaration of abandonment signed by the attorney or agent of record. A registered attorney or agent acting under the provision of § 1.34(a), or of record, may also expressly abandon a prior application as of the filing date granted to a continuing application when filing such a continuing application. Express abandonment of the application may not be recognized by the Office unless it is actually received by appropriate officials in time to act thereon before the date of issue.

35 U.S.C. § 41(a)(7) applies to the situation of the above-identified application (*i.e.*, to the revival of an abandoned application); however, it precludes the Commissioner from reviving the above-identified application, as the statute does not authorize revival of an intentionally abandoned application.

35 U.S.C. § 41(a)(7) authorizes the Commissioner to accept a petition "for the revival of an unintentionally abandoned application for a patent." As amended December 1, 1997, 37 CFR 1.137(b)(3) provides that a petition under 37 CFR 1.137(b) must be accompanied by a statement that the delay was unintentional, but provides that "[t]he Director may require additional information where there is a question whether the delay was unintentional." Where there is a question whether the delay was unintentional, the petitioner must meet the burden of establishing that the delay was unintentional within the meaning of 35 U.S.C. § 41(a)(7) and 37 CFR 1.137(b). See In re Application of G, 11 USPQ2d 1378, 1380 (Comm'r Pats. 1989). The language of both 35 USC 41(a)(7) and 37 CFR 1.137(b) are clear and unambiguous, and furthermore, without qualification. That is, the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been, without qualification, "unintentional" for the reply to now be accepted on petition.

However, in view of the express abandonment of this application, petitioner fails to

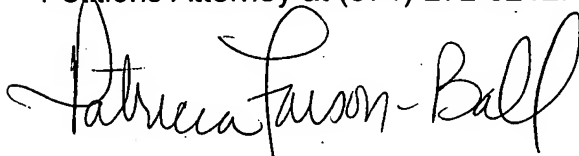
make the required showing that the delay was unintentional. Thus, the herein requested revival of an intentionally abandoned application is contrary to the meaning and intent of the statute. Rather, the intentional abandonment of an application precludes revival under 37 CFR 1.137(b).

The petition fee in the amount of \$1620 has been charged to deposit account no. 50-2387 per the authorization included with the petition.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
 Commissioner for Patents
 P.O. Box 1450
 Alexandria VA 22313-1450
By FAX: (571) 273-8300

Telephone inquiries concerning this matter may be directed to the undersigned Petitions Attorney at (571) 272-3212.

A handwritten signature in cursive script, reading "Patricia Faison-Ball". The signature is written in dark ink and is positioned above the printed name and title.

Patricia Faison-Ball
Senior Petitions Attorney
Office of Petitions